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IN THE

Supreme Court of the United States

October Term, 1949.

No. 189.

SHAMROCK TOWING CO., INC.,
Petitioner,

v.

F. E. GRAUWILLER TRANSPORTATION CO., INC., GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, THOMAS HENRY MATERIAL CO. and THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondents.

Brief for Thomas Henry Material Co., in Opposition to Petition for Writ of Certiorari.

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THE REPORTER COMPANY, INC., New York City—1949

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Petitioner predicates its petition upon four questions which it asserts are of sufficient importance to warrant the intervention of this Court. They will be answered in the order in which they are presented.

Before, however, doing so, it is necessary to correct certain statements made by petitioner and to add some others, in order to present the true picture.

The scow was placed by petitioner's tug at *4:25 P. M.*, and not at 5:25 P. M. as petitioner states (fol. 304). The tugmaster, although he knew and recognized the visible dangers there prevailing, due to the proximity of the exposed spiles to the dock, made no effort to assure himself of the safety of the scow but relied entirely upon the statement of the bargee that he was "all right"

(fol. 303) and left. He neither attempted to survey the situation for himself (fol. 316) nor to ascertain from the consignee that leaving the scow in that dangerous place was acceptable. The locale was familiar to him, he having made deliveries to and from that dock for fifteen years (fol. 338). Petitioner says that the "Sherlie remained in safety for over 5 hours after the tug had departed." That is not so, for she was never "in safety," moored where she was left by the tug close to the exposed spiles. Indeed, the District Court thought so, otherwise it would not have found the tug negligent for having placed the scow in that position (fols. 802, 806). The tug having brought that condition about with full knowledge of the foreseeable dangers, was bound to answer for the loss that followed, and if she sought to escape from the consequences of her own negligence, she was bound to show affirmatively that the disaster was due to the fault of the Thomas Henry Material Company.

In the case of the *B. B. No. 21,* 2 Cir., 54 F. 2d 532, the Court of Appeals said, in treating with a precisely similar situation:

> "* * * To be relieved from the consequences of his own fault, a wrongdoer *must do more than merely suggest the possibility that the tort of another may have intervened.* * * * The burden of proving that an intervening act of negligence caused the loss was on the (tug)."

Petitioner offered no proof either to exculpate itself or to establish negligence on the part of the Thomas Henry Material Company. Even the District Judge was unable to make such a finding, his holding that the Thomas Henry Company was liable being based upon an inference and nothing more (fols. 803, 810).

"An inference must be founded on a fact legally proved."

The Indien, 5 F. Supp. 349, affirmed 9 Cir., 71 F. 2d 752.
P. Sanford Ross v. Moran Towing & Trans. Co., Inc., 2 Cir., 55 F. 2d 1052.
The Pride, 2 Cir., 135 F. 2d 999.

Petitioner further says (p. 3) that at 10:00 P. M. or one hour after the bargee saw that his scow was in good shape he first realized that she was careening. That is not a correct statement of the facts as borne out by the record. The bargee's testimony was that *immediately* after he had gone up on the deck of his scow at 9:00 or 9:30 P. M., and found everything in order, he returned to his cabin when he noticed her listing (fols. 252-253), which precipitated her capsizing.

(1) We recognize the rule that an Appellate Court should not disturb the facts found by the Trial Court unless they are clearly erroneous. That the facts found in this case by the Trial Court were clearly erroneous is amply supported by the record. That was brought to the attention of the Court of Appeals by the Assignments of Error filed by the Thomas Henry Company (See Assignments 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, Record pp. 288-291). Libellant also assigned error for the same reason (Record p. 294) as did the respondent Gallagher Brothers Sand & Gravel Corporation (Record p. 296).

That an Appellate Court even in reviewing an admiralty decree is not throttled by the findings of the Trial Court is settled. And where the Trial Judge's opportunity to appraise the testimony was no better than was the opportunity of the Appellate Court, the latter could examine the testimony and make its own appraisal thereof.

Pfeiffer Oil Transp. Co. v. The Ira S. Bushey, 2 Cir., 129 F. 2d 606.
The Coastwise, 2 Cir., 68 F. 2d 720.
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The Anaconda, 4 Cir., 164 F. 2d 224.

Although the facts were in dispute, the more serious error committed by the Trial Court lay in its appraisal of or its deductions or inferences drawn from certain uncontroverted facts. The Appellate Court was in the same position as was the Trial Court to appraise these facts and make its own findings.

> "* * * but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage. It is true that, when the wrong is not deliberate, the occurrence of the loss or damage by hypothesis involves a factor of probability and it may be argued that probability is a question of fact. Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values; the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act. Certainly such a decision is not like a decision of fact uncolored by any element of choice or fiat. We are therefore free to exercise our own judgment upon Broges's conduct and we

hold that he was negligent both in failing to take quicker action to examine the cross bunker, in failing to break the hatches in the 'Reserve Bunker.' * * *"

Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 159 F. 2d 661, 665, Cert. denied, 67 S. Ct. 1519, 331 U. S. 836, 91 L. Ed. 1849.

It will be observed that this case, like the one at bar, was decided upon facts which were not disturbed by the Appellate Court but were rather appraised differently than the Trial Court, and this Court refused to grant a writ of certiorari to review that holding.

There should be, we respectfully submit, no apprehension to the shipping industry, as petitioner fears, over the revaluation of testimony by an Appellate Court in an admiralty case. Surely, petitioner does not seriously contend that every finding by a Trial Court is binding and conclusive upon an Appellate Court, for if that were so, an appeal would in most cases be a futile gesture. Indeed, the cases cited *supra* indicate clearly the latitude given to the Appellate Courts in reviewing findings made by the Trial Judge. There is, therefore, no merit to petitioner's contention under this point.

(2) There is no question here of a bailee's liability between the tug and the scow. It is rather a question whether the tug performed her duty imposed by contract and by law to tow her scow to destination. It cannot be said that that duty is fulfilled when the tug takes her tow to the designated place and leaves her there. The tug is required to do more. She must make *delivery,* which means that the tow must be properly and securely placed before the tug can depart and that the tug's obligation continues until that is done.

The Bartle Daly, 2 Cir., 45 F. 2d 605.
The B. B. No. 21, 2 Cir., 54 F. 2d 532.

In the latter case, the Court said:

> "When a tug finds that she cannot deliver her tow at its destination, it is her duty to return the tow to its owner or to tie it up at some safe place and protect it at the point called for (citing cases). To leave the boat in an unsafe berth was not a performance of the Victoria's contract of towage."

This has been the established law for many years and cannot now be questioned or even challenged by petitioner's novel attempt to escape from its contractual liability by establishing the relationship between a tug and her tow as a bailment. The only question is, did the tug perform her duty toward the scow, i. e., to tow her to her destination and properly place her there? If the answer is in the negative, liability falls on her, not as a bailee of the scow, but rather for negligence in the performance of her agreement. In the case at bar, the tug clearly failed in her duty by leaving the boat in an unsafe berth, and since disaster befell the scow as a result thereof, she became liable. Indeed, the District Court so held (fols. 796, 802), and the Court of Appeals agreed (p. 304).

3) Petitioner here for the first time is attempting to place part of the blame upon the scow owner to mitigate its own damages. Our answer to that contention is manifold.

(a) Nowhere in the course of the trial did petitioner make that contention. In fact, its counsel, when asked his position, stated very clearly (Record p. 51):

> "We made her fast in the only available berth there was * * * we made her fast in what we believe was the proper manner."

Thus the only defense asserted and sought to be established by the tug on the trial was that she had performed

her contract and that the disaster resulted from acts thereafter done by the Henry Company.

(b) Petitioner's assignment of error (Record p. 292) is silent as to the fault of the scow owner, merely charging fault in the Trial Court for finding the tug negligent.

Nor did it raise this question in its briefs submitted to the Court of Appeals; it did, however, do so only upon an application for a rehearing, which the Court of Appeals denied.

(c) Petitioner was bound to safely secure the scow and having left her there without even dispatching a deckhand to assure itself of her safety (Record p. 109) in that perilous location was a reckless disregard of its duty to the scow. It could not rely upon the opinion of the bargee that he was "all right" and then leave the scene. There is therefore no occasion for the application of the rule which would require the scow owner to share in the loss.

4. The last point raised by petitioner is so elementary that we believe it answers itself. Without attempting to again review the facts, it will be remembered that the tug failed in its first step by leaving the scow at a place where the danger of damage was foreseeable, as the subsequent events proved. Recognizing such dangers, as its master admitted, he was bound for his own protection, to obtain the acquiescence and approval of the Henry Company to leave her there. None of the Henry Company's employees were then at the dock, all having left for the day pursuant to a union contract; no member of the tug's crew was sent either to the dock to examine the scow's fastenings, or if he found them insecure, to report to the Henry Company's officials and get their consent that the scow be left there. That the bargee went to the office to report his arrival to some men who "were

busy writing" was in no sense a tender of delivery. Nor was the answer he received of "All right, Captain," an acceptance. This was after the tug had gone. Will petitioner seriously say that leaving a scow in such a perilous position without having first received the approval of an official of the consignee constituted a proper delivery? It showed rather a clear indifference to consequences in the hope that nothing harmful would happen.

Finally, we respectfully submit that petitioner's application is based upon a review of facts passed upon by two Courts. In such circumstances this Court has held that it does not grant certiorari to review evidence and specific facts.

Wisconsin Electric Co. v. Dunsmore Co., 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728.

The petition should be denied.

Respectfully submitted,

MAX ROCKMORE,
DAVID HAAR,
Proctors for Thomas Henry Material Company.